DEC 18

Supreme Court of the United States

OCTOBER TERM, 1936

No. 575

WILLIAM ELMER BROWN, JR.,

Petitioner,

vs.

EDWARD J. O'KEEFE, Receiver of THE UNION NATIONAL BANK OF ATLANTIC CITY, N. J.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WM. ELMER BROWN, JR.,

Counsel pro se.

I. F. Huntzinger Co., *Appellate Printers*, Camden, N. J.

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vs.

EDWARD J. O'KEEFE, Receiver of THE UNION NATIONAL BANK OF ATLANTIC CITY, N. J.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, William Elmer Brown, Jr., respectfully files and submits this as his petition for a writ of certiorari to review a decision and judgment of the United States Circuit Court of Appeals for the Third Circuit.

On January 24, 1936, said Circuit Court of Appeals reversed a decision and judgment of the District Court of the United States for the District of New Jersey in favor of respondent herein and against petitioner for damages alleged to be owing by reason of a national bank stock assessment (R. 70 to 72, incl.).

Petition for a rehearing was later filed (R. 75 to 80, incl.) and rehearing was granted on March 18, 1936, with argument restricted (R. 81).

Said Circuit Court of Appeals on September 24, 1936, after rehearing, affirmed said decision and judgment of said District Court (R. 82 to 85, incl.).

QUESTIONS PRESENTED.

1. Whether the liability of a stockholder of a national bank to assessment for the payment of the debts of the bank is a provable debt dischargeable in bankruptcy prior to the time when an assessment is actually levied thereon by the Comptroller of the Currency. So far this question has not been decided by this or any other Court prior to the determination in the instant case.

2. Whether the liability of a stockholder for the payment of the "contracts, debts and engagements" of a national bank (Act of Cong., Dec. 23, 1913, c. 6, §23, 38 Stat. 273; 12 U. S. C. A. §64) in the process of liquidation and closed to business under sections 5220 and 5221 of the National Banking Act (R. S. §5220 and 5221, Act of Cong., June 3, 1864, c. 106, §42, 13 Stat. 112; 12 U. S. C. A. §181 and 182) is a "debt," as defined in section 1, subdivision 11, of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §1, 30 Stat. 544; 11 U. S. C. A., sec. 1, subd. 11), provable within the purview of sections 63a and 63b (Act of Cong., July 1, 1898, c. 541, §63, 30 Stat. 562; 11 U. S. C. A. §103a and 103b) and dischargeable as provided for in section 35 (Act of Cong., July 1, 1898, c. 541, §17, 30 Stat. 550; 11 U. S. C. A. §35) though no assessment has been made on said stock by the Comptroller of the Currency (Act of Cong., June 30, 1876, c. 156, §1, 19 Stat. 63; R. S. 5151, Dec. 23,

1913, c. 6, §23, 38 Stat. 273), or by order of court (Act of Cong., June 30, 1876, c. 156, §2, 19 Stat. 63; 12 U. S. C. A. §65) before the filing of the petition in bankruptcy and particularly when said bank is insolvent.

3. Whether the liability of a stockholder of a national bank for assessment for the payment of the debts of a bank is a "contract, express or implied," within the purview of section 63-a-4 of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §35, 30 Stat. 555; 11 U. S. C. A. §63).

4. Whether the liability of a stockholder of a national bank for the payment of the debts thereof becomes fixed at the time of the acquisition of said stock or at the time the assessment thereon is levied and that particularly with reference to a bank in voluntary liquidation under sections 5220 and 5221 of the National Banking Act (R. S. §5220 and 5221; Act of Cong., June 3, 1864, c. 106, §42, 13 Stat. 112; 12 U. S. C. A. §181 and 182).

5. If the liability of a stockholder of a national bank for assessment for the payment of the debts of the bank is a "contract, express or implied" but not "absolutely owing" at the time of the filing of a petition in bankruptcy, whether it is such a debt as is dischargeable within the purpose, intention and purview of sections 63a and 63b of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §63, 30 Stat. 562; 11 U. S. C. A. 103).

6. If a stockholder in a national bank files a petition in bankruptcy listing his stock as an asset so that it thereby is transferred by operation of law to the trustee in bankruptcy more than 60 days in advance of an assessment made thereon to pay the debts of the bank and thereafter said trustee applies for and secures leave of the bank-

ruptcy court "to abandon all title to and disclaim all interest of the bankrupt" therein but does nothing more, whether that act amounts to an abandonment by said trustee within the purview of the law and the cases respecting disclaimer and abandonment of burdensome property so that the title to said stock reverts to the bankrupt with its attendant obligation for assessment without some act on the part of the bankrupt indicating his reassertion of title thereto.

STATUTES INVOLVED.

Section 35 of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §17, 30 Stat. 550; 11 U. S. C. A. §35) provides that "a discharge in bankruptcy shall release a bankrupt from all his provable debts" except such as are particularly scheduled therein. This case is not within said exceptions.

Section 1, subdivision 11 of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §1, 30 Stat. 544; 11 U. S. C. A. §1) defines "debt" to mean "any debt, demand, or claim provable in bankruptcy."

Section 63-a-4 of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §63, 30 Stat. 562; 11 U. S. C. A. §103-a-4) provides that "debts of the bankrupt may be proved and allowed against his estate which are • • • (4) founded upon • • • a contract express or implied."

Section 63-b of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, §63, 30 Stat. 562; 11 U. S. C. A. §103-b) provides that "unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate."

By Act of Congress passed December 23, 1913, (c. 6, §23, 38 Stat. 273; 12 U. S. C. A. §64) stockholders of national banks are "held individually responsible for all contracts, debts and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock." Further, by said Act it is provided that stockholders "who shall have transferred their shares • • • within sixty days • • • before • • • the failure of such association to meet its obligations, or with knowledge of such impending failure" shall be liable as though the transfer had not been made.

The National Banking Act (R. S. §5220; Act of Cong., June 3, 1864, c. 106, §42, 13 Stat. 112; 12 U. S. C. A. §181) provides that "any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock."

Section 2 of the Act authorizing the appointment of receivers of national banks (Act of Cong., June 30, 1876, c. 156, §2, 19 Stat. 63; 12 U. S. C. A. §65) provides that "when any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes • • • the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association, by bill in equity in the nature of a creditor's bill" etc.

The first six lines of section 5151 of the Revised Statutes (12 U. S. C. A. §63) respecting the individual liability of shareholders of national banks were repealed by Act of Cong., Dec. 23, 1913, c. 6, §23, 38 Stat. 273 (12 U. S. C. A. §64). The latter section omitted the words "equally and ratably."

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The Receiver of the Union National Bank of Atlantic City, N. J., instituted suit in the United States District Court for the District of New Jersey to recover assessment made by the Comptroller of the Currency of the United States upon the capital stock of said bank alleged to be owned by petitioner (R. 3 to 5, incl.).

Petitioner filed answer thereto denying ownership of the stock of said bank and charged that petitioner's liability to assessment was a provable debt or claim fixed or capable of liquidation at the time of petitioner's adjudication and discharge in bankruptcy and so, therefore, was discharged because (a) said liability was as a surety; (b) said liability was a debt or liability founded on implied contract; (c) said liability had occurred at the time of and prior to petitioner's discharge; (d) said Union National Bank became insolvent, closed its doors and went into voluntary liquidation before petitioner's bankruptcy; and (e) said liability was capable of being enforced at the time of petitioner's bankruptcy (R. 6 to 18, incl.).

The plaintiff moved to strike petitioner's answer and enter summary judgment alleging the answer was sham and the defenses were frivolous (R. 19 to 24, incl.). Supporting affidavits were filed (R. 25 to 31, incl.).

Petitioner herein filed an answering affidavit on said motion (R. 33 to 42, incl.) whereby it was proven that said Union National Bank was insolvent on September 30, 1931, and, therefore, unable to continue its business; that on that date it entered into agreement with the Atlantic City National Bank (a copy of which was attached to said affidavit, R. 38) providing for its liquidation; that on said date said

Union National Bank discontinued its business and delivered all its assets to said Atlantic City National Bank in pursuance of said agreement; that said Union National Bank was placed in voluntary liquidation in accordance with Sections 5220 and 5221 of the United States Revised Statutes, the same to take effect December 15, 1931; that at the time of the discontinuance of business by said Union National Bank petitioner was the owner of stock thereof; that on January 30, 1933, said Atlantic City National Bank, liquidating agent of said Union National Bank as aforesaid, was declared insolvent by the Comptroller of the Currency of the United States and placed in the hands of Laurence A. Slaughter, as Receiver, who, as receiver of said Union National Bank, is the plaintiff in this suit; that petitioner herein was adjudicated a bankrupt on April 21, 1933, and was discharged of all debts and claims on July 31, 1933; that the stock of said Union National Bank referred to in the complaint filed in this suit was included in the schedule of assets filed in said bankruptcy proceeding and said Union National Bank was included in the list of creditors filed therein; that petitioner herein also listed in said schedules his liability for assessment on said bank stock; that said Atlantic City National Bank, liquidating agent of said Union National Bank, and its receiver were included in the list of creditors filed in said bankruptcy proceedings; that on December 13, 1933, said Union National Bank was declared insolvent by said Comptroller of the Currency and said Slaughter was duly appointed receiver thereof; that at the time of petitioner's adjudication as a bankrupt as aforesaid it had been determined that said Union National Bank was insolvent; that ever since September 30, 1931, it had continuously been closed to business and that its assets were insufficient in value to liquidate at a sum equal to the value placed upon them by said agree-

ment of September 30, 1931; and that at the time of petitioner's adjudication as a bankrupt it had also been definitely determined and known that an assessment and requisition upon the shareholders of said Union National Bank to the total par value of the amount of stock outstanding would be necessary to pay the debts and claims of said bank. Also it was disclosed in said affidavit that the insolvency and necessity for assessment on the stock of said Union National Bank was well known to said Slaughter, the plaintiff herein, at the time of petitioner's adjudication as a bankrupt and for a long time prior to his appointment as receiver of said Union National Bank (R. 38, par. 20).

Plaintiff herein filed supplemental affidavit to be considered on said motion for summary judgment (R. 43 to 46, incl.) but nowhere therein was it denied that said Union National Bank was insolvent from a time prior to petitioner's adjudication as a bankrupt. In fact said Slaughter, plaintiff herein, in his said affidavit admits that, before his appointment as receiver of said Union National Bank, he knew of the insolvency of said bank and that an assessment would be made upon the stockholders thereof (R. 45, line 23).

In spite of the uncontradicted facts then appearing as aforesaid the United States District Court for the District of New Jersey struck out the answer filed and it was then determined and held that the obligation of petitioner, as the owner of said stock, did not arise out of contract, express or implied, but was in the nature of a statutory liability and that said obligation was not a provable debt or claim at the time of appellant's adjudication and did not become so until the Comptroller made the assessment thereon (R. 47 to 59, inc). Summary judgment was accordingly entered on July 20, 1935, against petitioner herein (R. 60).

By order duly made on April 24, 1935, Edward J. O'Keefe, Receiver of said Union National Bank appointed to succeed said Laurence A. Slaughter resigned, was substituted as party plaintiff in said suit (R. 46).

An appeal from said judgment was taken by petitioner herein to the Circuit Court of Appeals for the Third Circuit (R. 62 to 67, incl.). On January 24, 1936, said Circuit Court of Appeals filed its opinion reversing said judgment and holding that petitioner herein, having by force of law been deprived of all interest in, or ownership of, the stock, by reason of his adjudication in bankruptcy and the vesting of title thereto in his trustee, and ownership never having revested in petitioner herein, it was error to hold that petitioner was the owner when the stock was assessed (R. 70 and 71).

On January 24, 1936, an order was accordingly entered in said Circuit Court of Appeals reversing said judgment (R. 72).

Plaintiff (respondent herein) thereafter filed petition with said Circuit Court of Appeals for rehearing alleging that in the findings of that court the evidence in the case had been misapprehended, misconceived and overlooked (R. 75). In said petition for rehearing it was pointed out that the trustee in bankruptcy for petitioner herein had addressed a petition to the Referee in Bankruptcy praying authority to abandon all title to and disclaim all interest of the bankrupt in said stock and that by order of said Referee said petition was granted.

On March 18, 1936, said petition for rehearing was granted and "argument restricted to the question whether when the trustee disclaimed title to the bank stock which the law vested in him, he can reconfer title in the bankrupt without some affirmative action on the latter's part" (R. 81).

On September 24, 1936, said Circuit Court of Appeals filed its opinion on rehearing by which it found that said trustee had declined to accept the stock so that the ownership of said stock reverted to the bankrupt, the petitioner herein, and that the statutory liability of petitioner to assessment was not a provable claim for the reason that assessment had not been made thereon at the time of petitioner's adjudication as a bankrupt and so, consequently, was not discharged. Further, said Circuit Court of Appeals withdrew its opinion filed January 24, 1936, and substituted its opinion on rehearing therefor (R. 82 to 84, incl.). Accordingly on September 24, 1936, an order was entered affirming said judgment (R. 84).

On the rehearing of said appeal the appellee contended that it was conceded below that the petitioner herein was the owner of the stock at the time the assessment was levied. There was no admission whereby it could be so contended. The third paragraph of the complaint filed in this case alleged that the petitioner herein was "the owner of ten (10) shares of the capital stock of the Union National Bank of Atlantic City, N. J." (R. 4). By the third paragraph of the answer filed that allegation was denied (R. 7). The allegations of the "First Defense" (R. 6) set up in said answer, which it is alleged this petitioner consented to strike, were superfluous. Any consent to strike said "First Defense" did not dispose of the denial of ownership contained in the third paragraph of the answer.

RULINGS OF THE COURT BELOW.

The Circuit Court of Appeals adopted the opinion of the District Court as its opinion and said (R. 83) "the Judge in an exhaustive and, to us, satisfactory opinion held" etc.

The District Court, in its opinion filed in this case said

(R. 50), "While it may be that a creditor might have leave to prove a debt accruing after adjudication, under the circumstances in this case • • • I am satisfied that the question involved is whether the amount due on the assessment was or was not a provable claim at the time of adjudication." Further that court said (R. 50), "Under the early cases it is somewhat debatable as to whether the obligation is a contract or a claim based upon a statutory liability." It was held (R. 51) "quite clear that the one in whose name stock stands on the books of the association remains liable for assessment, so long as the stock is allowed to stand in his name." Said District Court recognized (R. 55) that "there are some cases, as against estates, devisees and legatees, in which it is held that the liability arises prior to the insolvency of the bank, and prior to the assessment by the Comptroller, for the purpose of charging the estates or beneficiaries with the payment of the assessment, but these decisions do not change the basic principle adopted in the McClain case." The District Court conceived the basic principle of the McClain case to be (R. 51) that the liability to stock assessment was a statutory liability, not a contract express or implied, and that the debt arising therefrom did not arise until the Comptroller had acted. The Court held (R. 56) that "if the Union National Bank was actually insolvent on September 30, 1931," the date when it went into involuntary liquidation, "the liability of the defendant could not be fixed on that date • • • and it was impossible to fix the defendant's liability until after the bank had been taken over by the Comptroller." Said District Court finally concluded (R. 56) "that the obligation of the defendant did not arise out of contract, express or implied, but was in the nature of a statutory liability, and that the debt arising therefrom became due and owing at the time the assessment was made. The liability of the shareholder, as to the debts of the national bank, is with relation to those debts owing

at the time the assessment is made" and further said (R. 58) "under the circumstances of the instant case, I am satisfied that the ownership of the stock was in the defendant at the time of assessment; that the obligation was not a provable claim against the bankrupt estate at the time of adjudication; that the discharge of defendant as a bankrupt did not relieve him from the assessment on his stock made thereafter; and that the fact that the Union National Bank went into voluntary liquidation prior to defendant's adjudication as a bankrupt could not fix the liability of defendant prior to adjudication, unless proceedings had been taken prior thereto under the provisions of 12 U. S. C. A. 65." Summary judgment was accordingly entered.

The Circuit Court of Appeals by its first opinion filed January 24, 1936 (R. 71), held:

> "Assuming for present purposes that the court was right in its holding that the liability to assessment was not a provable debt, the question remains was the court right in holding that the ownership of the stock was in Brown at the time of the assessment? Now Brown was not liable to assessment unless he was the 'real owner' of the stock at the time of assessment, for such is the test laid down in 280 U. S. 496, where it is said: 'That the actual owner of the stock may be held for the assessment although his name does not appear upon the transfer books of the bank, is well settled.'
>
> "Moreover the fact is that on Brown's bankruptcy the ownership of this stock, by act of law, passed to his creditors and was vested in his trustee. Brown could not sell, control, assert or exercise any act of ownership over it. No doubt, the trustee could, by leave of court, have declined to accept the stock and surrendered it to Brown. But he neither did so nor applied to the court for leave so to do. It follows, therefore, that Brown, having by force of law been deprived of all interest in, or ownership of, the stock

and ownership never having reinvested in him; the court was in error in holding he was the owner when the stock was assessed. The judgment is, therefore, reversed."

After rehearing "restricted to the question whether when the trustee disclaimed title to the bank stock which the law vested in him, he can re-confer title in the bankrupt without some affirmative action on the latter's part" (R. 81), said Circuit Court of Appeals disposed of the question previously decided by it by referring to the finding of the District Court that defendant had consented to striking the first defense contained in his answer (R. 82) and then affirmed the judgment below by adopting the opinion of the District Court holding "that the statutory liability of the defendant to future assessment was not a provable claim and consequently was not discharged" (R. 83).

REASONS FOR GRANTING THE WRIT.

1. The questions in issue are of great importance in administering the bankruptcy law. A review of the questions in this court will set at rest much doubt and assure a uniform and proper application of the law respecting bankruptcy and the liability of shareholders of national banks.

2. The question involved in this case, *e. g.*, whether the liability of a stockholder of a national bank is a provable debt dischargeable in bankruptcy prior to assessment, is a question of Federal law, which has not been, but should be settled by this court.

3. The decision of the Circuit Court of Appeals holding, as it does, that the liability of a shareholder of a national bank to assessment does "not arise out of a contract, express or implied" is in conflict with and contrary to the decisions of this Court in *Richmond v. Irons*, 121 U. S. 27, 7 S. Ct. 788, 30 L. Ed. 864, 871; *Concord First National Bank v. Hawkins*, 174 U. S. 364, 372, 43 L. Ed. 1007, 1011; *Mattson v. Dent*, 176 U. S. 521, 525, 44 L. Ed. 571, 573, 20 S. Ct. 419; *McDonald v. Thompson*, 184 U. S. 71, 22 S. Ct. 297, 46 L. Ed. 437; *Christopher v. Norvell*, 201 U. S. 216, 26 S. Ct. 502, 50 L. Ed. 732, 5 Ann. Cas. 740; *Broderick v. Rosner*, 294 U. S. 629, 55 S. Ct. Rep. 589, 79 L. Ed. 1100, and *Seabury v. Green*, 294 U. S. 165, 168, 79 L. Ed. 834, 837, 55 S. Ct. 373, in which this Court held that the statutory liability of the shareholder of a national bank is contractual in character.

The decision of said Circuit Court of Appeals in the foregoing respect is also in conflict with the opinions of the Circuit Courts of Appeals in the following cases: *Scott v. Latimer*, 89 Fed. 843 (C. C. A. 8th); *Deweese v. Smith*, 106 Fed. 438 (C. C. A. 8th), affirmed 187 U. S. 637; *Williams v. Travis*, 277 Fed. 134 (C. C. A. 5th); *Bromfield v. Mayer*, 29 F. (2d) 891 (C. C. A. 8th); and *Drain v. Stough*, 61 F. (2d) 668 (C. C. A. 9th), all of which cases recognize the said stock liability as contractual.

4. The decision of said Circuit Court of Appeals holding, as it does, that the debt arising from said stock liability did not become due and owing until the assessment thereon was made is in conflict with and contrary to the decisions of this Court in *Terry v. Tubman*, 92 U. S. 156, 23 L. Ed. 537, and *Terry v. Anderson*, 95 U. S. 628, 632, 24 L. Ed. 365, 366, in which it was held that the liability of the stockholders arises when the bank refuses or ceases

to redeem and is notoriously and continuously insolvent and in *Smith v. Brown*, 187 U. S. 637, 23 Sup. Ct. 845, 47 L. Ed. 344, affirming *Deweese v. Smith*, 106 Fed. 438, in which it was held that the liability of the shareholder attaches when the "contracts, debts and engagements" of the bank are entered into.

The decision of said Circuit Court of Appeals in the foregoing respect is also in conflict with the Circuit Courts of Appeals in the following cases: *Murray v. Sill*, 7 Fed. (2d) 589 (C. C. A. 9th); *Foster v. Lincoln*, 79 Fed. 170 (C. C. A. 2d), affirming 74 Fed. 382; *Carey v. Mayer*, 79 Fed. 926 (C. C. A. 2d).

5. The decision of said Circuit Court of Appeals holding that the statutory liability of petitioner herein was not a provable claim because it was not a debt due and owing at the time of petitioner's adjudication as a bankrupt is in conflict with and contrary to the decision of this Court in *Maynard v. Elliott*, 283 U. S. 273, 275, 51 S. Ct. 390, 75 L. Ed. 1028, 1030, in which it was held "settled that claims founded upon contract, which at the time of the bankruptcy are fixed in amount or susceptible of liquidation, may be proved under subdivision (a) (4) of that section although not 'absolutely owing' when the petition is filed."

The decision of said Circuit Court of Appeals in the foregoing respect is also in conflict with a former decision of that Court in *Moch v. Market St. Natl. Bank*, 107 Fed. 897 (C. C. A. 3rd), in which it was held that "the first and fourth subdivisions of section 63" of the Bankruptcy Act "are distinct provisions and are • • • independent of each other" and that the limitation of subdivision one requiring that the claim must be "absolutely owing" cannot be carried down and read into subdivision 4.

6. The decision of said Circuit Court of Appeals holding that the liability of petitioner herein to assessment as a shareholder of a national bank was not discharged by his discharge in bankruptcy is in conflict with and contrary to the decisions of this Court in *Maynard v. Elliott,* 283 U. S. 273, 75 L. Ed. 1028, in which it was held that in the light of the purpose of the Bankruptcy Act "a meaning cannot be attributed to the plain words of subdivision (a) (4) which would restrict them as to preclude proof of claim upon the liability of an endorser of commercial paper and result in its survival of the bankrupt's discharge as an obligation enforceable against him" and in *Wolf v. Stix,* 99 U. S. 1, 7 and 8, 25 L. Ed. 309, 315, in which it was held that the debt arising under a replevin bond "payable upon the happening of an event which might never occur" and, therefore contingent, said bond being in full force when the petition in bankruptcy was filed, the sum to be paid being certain in amount, was provable in bankruptcy.

7. The decision of the Circuit Court of Appeals holding that petitioner herein, after his adjudication as a bankrupt and as a result of his trustee's alleged disclaimer and abandonment of said stock, became the owner thereof, without any affirmative act on his part, and was reinvested with the liability to assessment thereon, is in conflict with and contrary to the decisions of this Court in *First National Bank of Jacksboro v. Lasater,* 196 U. S. 118, in which it was held that if a trustee in bankruptcy declines to take title to property of the bankrupt, "the bankrupt can assert title thereto."

The decision of the Circuit Court of Appeals in the foregoing respect is also in conflict with and contrary to the decision of the Circuit Court of Appeals for the Second

Circuit *In re Wattley*, 62 Fed. (2d) 828, 829 (C. C. A. 2d), and to the decision of the Circuit Court of Appeals for the Fourth Circuit *In re Webb*, 54 Fed. (2d) 1065, 1067 (C. C. A. 4th), in which cases it was held that when property is abandoned by a trustee in bankruptcy, "the bankrupt may reassert whatever title he had before bankruptcy."

PRAYER FOR WRIT.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify, and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 5941, October Term, 1935, William Elmer Brown, Jr., Appellant, v. Edward J. O'Keefe, Receiver of the Union National Bank of Atlantic City, N. J., Appellee"; and that said judgment of the said United States Circuit Court of Appeals for the Third Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

WM. ELMER BROWN, JR.,
Petitioner and Counsel pro se.

Supreme Court of the United States

OCTOBER TERM, 1936

No.

WILLIAM ELMER BROWN, JR.,
Petitioner,

v.

EDWARD J. O'KEEFE, Receiver of THE UNION NATIONAL BANK OF ATLANTIC CITY, N. J.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE COURT BELOW.

The opinion of the District Court was written by District Judge John Boyd Avis and filed July 19, 1935. It is reported in 16 F. Supp. 494, and appears on page 47 of the Record. The two opinions of the Circuit Court of Appeals (Circuit Judges Buffington, Davis and Thompson, Judge Buffington writing) were filed January 24, 1936, and September 24,

1936. The first of said opinions is not reported but appears on page 70 of the Record. The latter opinion is reported in 85 Fed. (2d) 885, and appears on page 82 of the Record.

II.

JURISDICTION.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938 (28 U. S. C. A. §347). The judgment of the Circuit Court of Appeals was entered September 24, 1936 (R. 84).

III.

STATEMENT OF THE CASE.

The essential facts of the case are stated in the foregoing petition. It should be borne in mind that, approximately six months after petitioner's discharge in bankruptcy, an assessment was levied against him as the last owner of record of certain stock in the Union National Bank, insolvent. Said bank had discontinued business about 18 months before petitioner herein filed his petition in bankruptcy, having transferred all its assets to another national bank under an agreement whereby the latter undertook to, and did, satisfy all of the transferor's liabilities and the former agreed to make good any loss thereby suffered. After petitioner's adjudication, an assessment was made because of a deficiency in the assets of the bank. In this suit by the receiver of said bank to recover the assessment, petitioner set up his discharge in bankruptcy as a bar.

Reference will hereafter be made herein to the District Court opinion. This is made necessary because that opinion was adopted and accepted by the Circuit Court of Appeals as satisfactory basis and reasoning for its affirmance. It said (R. 83) "the Judge in an exhaustive and to us, satisfactory opinion, held that the statutory liability of the defendant to future assessment was not a provable claim and consequently was not discharged."

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in holding that petitioner's liability to assessment was a statutory liability, not a "contract, express or implied."

2. The Circuit Court of Appeals erred in holding that petitioner's liability to assessment was not a provable debt or claim against petitioner's bankrupt estate.

3. The Circuit Court of Appeals erred in holding that the discharge of petitioner in bankruptcy did not relieve him from the assessment made on said bank stock.

4. The Circuit Court of Appeals erred in holding that petitioner was the owner of said bank stock at the time the assessment thereon was made.

V.

ARGUMENT.

Point A.

The liability of a stockholder of a national bank to assessment for the payment of the debts of the bank is a "contract, express or implied" within the purview of Section 63-a-4 of the Bankruptcy Act.

The Court below based its judgment in this case partly upon the finding that "the obligation of the defendant did not arise out of contract, express or implied, but was in the nature of a statutory liability" (R. 83). In so holding the Court pointed to the opinion of the Supreme Court in *McClaine v. Rankin,* 197 U. S. 154, 49 L. Ed. 702, as authority. In this respect petitioner contends the Court below fell into error.

In numerous cases decided in this and other Federal Courts it has been held that the liability of stockholders of national banks is contractual.

In *Concord First Nat'l Bank v. Hawkins,* 174 U. S. 364, 372, 43 L. Ed. 1007, 1011, it was said:

> "Undoubtedly, the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But as the ownership of the stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation."

In *Mattson v. Dent,* 176 U. S. 521, 525, 44 L. Ed. 571, 573, a widely quoted authority, the Court said:

> "The obligation of a subscriber to stock * * * is contractual and arises from the subscription to the stock. * * * the obligation to respond is engendered by and relates to the contract from which it arises."

In relying upon *McClaine v. Rankin*, 197 U. S. 154, 49 L. Ed. 702, the Court below, in the instant case, pointed out that it was there said (at page 161) that the liability was "collateral and statutory." But in that case this Court conceded "that a statutory liability may be contractual in its nature, or more accurately, quasi-contractual" (at page 159). A thorough reading of the opinion in the McClaine case does not warrant the conclusion that the Court regarded the stockholder's liability as statutory except under the peculiar circumstances of that particular case. In that case the Court was called upon to consider the effect of the Washington statute of limitations as applied to a suit brought to recover a stockholder's assessment. It is no authority for saying that the stockholder's liability is not dischargeable in bankruptcy as a "contract, express or implied."

The Court below in the instant case also said that the case of *Christopher v. Norvell*, 201 U. S. 216, 50 L. Ed. 732, "fully sustains the principle declared in the McClaine case" (R. 51). While it is true that the McClaine case is cited in *Christopher v. Norvell*, it is there held that the stockholder's liability to assessment did not arise "wholly out of contract" but that it was "contractual in its nature."

In every case in which the stockholder's liability has been said to be "statutory" the question whether said liability was dischargeable in bankruptcy was not under consideration. In those cases the construction of State statutes was before the Courts as was pointed out in *Rogers v. Jarden*, 3 Fed. Supp. 211 (D. C., E. D. Pa.).

No case has been found in which it has even been suggested that the stockholder's liability is not dischargeable because not comprehended among those debts classified in Section 63-a of the Bankruptcy Act (Act of Cong., July 1, 1898, C. 541, §63, 30 Stat. 562, 11 U. S. C. A. §103). On the contrary, those cases in which said liability has been held dischargeable have classified it under subdivision 4 of that section referring to debts "founded • • • upon a contract express or implied." A stockholder's liability to assessment being dischargeable in bankruptcy it can only be as a "contract." The fact that such liability is dischargeable is, therefore, contradictory of the finding of the Court below in the instant case that said liability "did not arise out of contract, express or implied, but was in the nature of a statutory liability." (R. 56 and R. 83).

Point B.

The liability of a stockholder for the payment of the "contracts, debts, and engagements" of an insolvent national bank in the process of liquidation and closed to business is a "debt" provable within the purview of Sections 63-a and 63-b of the Bankruptcy Act and, therefore, is dischargeable though no assessment has been made on said stock before the filing of the petition in bankruptcy.

In the recent case of *Local Loan Co. v. Hunt*, 292 U. S. 234, 243, 78 L. Ed. 1230, 1235, this Court held that an adjudication in bankruptcy releases a debtor from all previously incurred debts and it cannot be supposed that the Act intended to keep such debts alive for the purpose of permitting the creation of an enforceable lien upon a subject not existent when the bankruptcy became effective

or even arising from, or connected with, pre-existing property but brought into being solely as the fruit of the subsequent labor of the bankrupt.

Section 63-a-4 of the Bankruptcy Act (Act of Cong., July 1, 1898, C. 541, §63, 30 Stat. 562, 11 U. S. C. A. §103), provides that

> "debts of the bankrupt may be proved and allowed against his estate which are * * * (4) founded on * * * a contract express or implied."

In *Williams v. U. S. F. & G. Co.*, 236 U. S. 549, 556, 59 L. Ed. 713, 717, it was said:

> "Within the intendment of the law provable debts include all liabilities of the bankrupt founded on contract, express or implied, which at the time of the bankruptcy, were fixed in amount or susceptible of liquidation."

1.

The stockholder's liability to assessment is comparable to that of a surety or guarantor.

The Court below in its opinion (R. 50) says:

> "I am unable to agree with the decided cases holding that a stockholder in a national bank becomes a surety as to his liability for assessment to pay the creditors of an insolvent institution."

In the case of *Coombs v. Getz*, 285 U. S. 434, 76 L. Ed. 866, this Court was called upon to construe a provision of the California Constitution very similar to the statute prescribing the liability of stockholders in national banks. In that case it was said (at page 448) the obligation was "a contractual liability in the nature of a suretyship."

It was held in the case of *In re Rouse*, 1 A. B. R. 293 (D. C., N. D. Ohio, E. D.), that:

> (at p. 399) "The undertaking of a stockholder when he takes stock may be likened to that of a surety or guarantor — he undertakes to pay his pro rata within certain limits in case the corporation fails to do so. • • • (at p. 402) It is • • • a collateral security for the benefit of creditors as declared by our Supreme Court and as such is not a penalty for misbehavior, but rather a contract of suretyship for corporate debts."

In *King v. Pomeroy*, 121 Fed. 287 (C. C. A. 8th) the Court spoke of the stockholders as "the guarantors of its" (the corporation's) "obligations" and said that the stockholder's liability "was the pledge of a trust fund for the benefit of creditors."

2.

Claims founded upon contract are provable though not due and owing when the petition in bankruptcy is filed.

In the court below respondent urged that the petitioner's liability "was not fixed and absolutely owing at the time defendant filed his petition and his liability, if any, was at that time purely contingent." The Court below apparently agreed with this view and said (R. 35), "I am convinced that • • • the debt arising therefrom became due and owing at the time the assessment was made. The liability of the shareholder, as to the debts of the national bank, is with relation to those debts owing at the time the assessment is made." This is, in effect, saying that the debt is not dischargeable unless due and owing at the time of the bankrupt's adjudication and discharge. In this respect the Court below fell into error.

The "debt" (stockholder's assessment), being founded on contract implied by force of Act of Cong., Dec. 23, 1913, c. 6, §23, 38 Stat. 273; R. S. §5151; 12 U. S. C. A., §63, need not be due and owing to be the subject of a discharge in bankruptcy. That was the decision of this Court in the case of *Maynard v. Elliott*, 283 U. S. 273, 275, 75 L. Ed. 1028, 1030. Mr. Justice Stone, speaking for the Court, said:

> "Although the omission of any reference to contingent claims in Sec. 63 of the present act has led to some confusion and uncertainty in the decisions, *it is now settled that claims founded upon contract*, which at the time of the bankruptcy are fixed in amount or susceptible of liquidation, *may be proved under subdivision* (*a*) (4) *of that section, although not absolutely owing when the petition is filed.*"

3.

Assuming, but not admitting, that the liability of petitioner in this case was contingent at the time of the filing of his bankruptcy petition it, nevertheless, was provable. From the mere fact that some contingent claims are deemed not provable it does not necessarily follow that no contingent claims are provable. In *Maynard v. Elliott*, 283 U. S. 273, 75 L. Ed. 1028, it was held that where the amount is certain and the contingency is within the control of the creditor so far as its certainty of accrual and its susceptibility of liquidation are concerned, the debt was discharged, although the creditor had done nothing at the time of the bankruptcy to satisfy the liability. In the instant case the amount was certain for petitioner's liability was fixed and limited to the extent of the par value of his stock. It was within the power and the contingency,

if any, was within the control of the respondent so far as its certainty of accrual and its susceptibility of liquidation were concerned. Act of Cong., July 1, 1898, c. 541, §63, 30 Stat. 562; 11 U. S. C. A., Sec. 103-b, and Act of Cong., June 30, 1876, c. 156, §2, 19 Stat. 63; 12 U. S. C. A., §65.

In Collier on Bankruptcy, Thirteenth Edition, Vol. 2, at page 1421, it is said:

> "The test as to whether a claim is really contingent or simply one unliquidated by legal proceedings is this: Have all the facts necessary to be proved to fasten liability already occurred? If so the claim is not contingent."

In the instant case all the facts necessary to be proved to fix the stockholder's liability had occurred and were known to this plaintiff, who was receiver for the Atlantic City National Bank, the principal creditor of the defunct Union National Bank, and such was the status of affairs at the time this petitioner filed his petition in bankruptcy.

In *Wolf v. Stix*, 99 U. S. 1, 25 L. Ed. 309, Mr. Chief Justice Waite, in discussing the question of the liability arising under a replevin bond in an attachment proceeding to answer the judgment of the Court for the value of the goods replevied, and whether such liability constituted a contingent debt provable in bankruptcy under the Act of 1867, said at pages 7 and 8, 99 U. S., and page 313, 25 L. Ed.:

> "The debt thus created was provable under the bankruptcy act. It was payable upon the happening of an event which might never occur, and was, therefore, contingent. The bond was in full force when the petition in bankruptcy was filed. The sum to be paid was certain in amount. Whether the event will ever occur, the amount to be paid was fixed."

4.

Petitioner's liability to assessment was fixed and certain.

During the consideration of this whole matter it is essential that we have in mind the financial status of the Union National Bank on September 30, 1931 (the date when it went into voluntary liquidation), and thereafter. Defendant's answer, which was stricken by the Court below, charges the insolvency of the bank and supports that charge by affidavit filed. No contradiction of that fact was made by respondent, and, of course, in view of the fact that the decision below was on motion to strike the answer, the allegations of the answer are taken as admitted. The fact of insolvency being certain, petitioner's stock was subject to assessment to meet the deficiency between assets and liabilities to the limit of the par value thereof.

It is apparent that Congress recognized the liability to assessment as fixed because in the statute providing for that liability it is provided (Act of Cong., Dec. 23, 1913, c. 6, §23, 38 Stat. 273; 12 U. S. C. A., Sec. 64), that the stockholder cannot escape his liability by a transfer of his stock made less than 60 days prior to the date of the failure of the bank to meet its obligations or with knowledge of such impending failure.

In *Terry v. Tubman*, 92 U. S. 156, 165, Mr. Justice Hunt, speaking for the Court, said:

> "the liability of the stockholders arises when the bank refuses or ceases to redeem and is notoriously and continuously insolvent."

The case last cited above was referred to with approval by the Supreme Court in *Terry v. Anderson*, 95 U. S. 628.

In *Carey v. Mayer*, 79 Fed. 926, 929 (C. C. A. 2nd), the Court said:

> "when the fact of insolvency has been confessed, and an assignment for the benefit of its creditors has been made, nothing remains to be done, in order to make the liability a fixed debt, but to ascertain the amount of the assessment by the intervention either of the corporation or of a court of chancery."

There are many cases which seem to refute the findings of the Court below that petitioner's liability as a stockholder of the Union National Bank did not become fixed, and, therefore, provable until the Comptroller's assessment was made thereon. The insolvency and voluntary liquidation of the Union National Bank preceded the Comptroller's assessment by more than two years.

Whether or not a debt is provable is not to be determined by the method of enforcement of it. It was said *In re Southern Steel Co.*, 183 Fed. 498 (D. C., N. D. Ala., S. D.):

> "the remedy by which a liability is enforced is not determinative of its provability as a debt in bankruptcy. The nature of the liability is rather the test."

The District Court here held that petitioner's obligation was not a provable debt because it was impossible to fix liability until after the bank had been taken over by the said Comptroller (R. 56). It relied upon *Scovill v. Thayer*, 105 U. S. 143 (R. 56), and *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184 (R. 58). The Circuit Court of Appeals adopted this view (R. 83). The cases cited by the Court below involved the recovery of an assessment due on account of a subscription to stock, not fully paid for, and the question of the time when the statute of limitations commenced to run against such action. Said cases had no reference to an

assessment made by the Comptroller under the authority of the National Banking Act.

Also in the case of *Harrigan, Trustee, &c., v. Bergdoll*, 270 U. S. 560, 70 L. Ed. 733, it was held that by the law of Pennsylvania, liability of shareholders of a business corporation to pay unpaid stock subscriptions for defrayal of the corporation debts becomes fixed so that the statute of limitations begins to run as soon as it is definitely ascertained that a company is insolvent and will be obliged to call unpaid stock subscriptions in order to satisfy its obligations. Also in this case the Court distinguished *Scovill v. Thayer, supra.*

In *Glenn v. Dorsheimer*, 23 Fed. 695 (C. C., E. D. Mo.), it was held that where an insolvent corporation ceases to do business, and assigns all its property, including unpaid stock subscriptions, to trustees for the benefit of its creditors, the liability of its stockholders at once becomes absolute, and the statute of limitations begins to run in their favor, and against such creditors and trustees, immediately. The Court in that case distinguished *Scovill v. Thayer, supra.*

In reliance upon the great weight of authority, it is respectfully submitted that petitioner's liability as a stockholder of the Union National Bank became fixed and susceptible of liquidation at least at the time of the occurrence of insolvency of that bank which was before the time of the filing of petitioner's petition in bankruptcy.

5.

Petitioner's liability to assessment was capable of liquidation and enforcement.

Section 2 of the Act of Cong., June 30, 1876, c. 156, 19 Stat. 63 (12, U. S. C. A., §65), reads as follows:

> *"When any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes,"* (Act of Cong., June 3, 1864, c. 106, §42, 13 Stat. 112; 12 U. S. C. A., §181) *"the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes"* (Act of Cong., Dec. 23, 1913, c. 6, §23, 38 Stat. 273; 12 U. S. C. A. §63) *"may be enforced by any creditor of such association,* by bill in equity in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established."

In the case of *Wyman v. Wallace*, 201 U. S. 230, 50 L. Ed. 738, a proceeding by a creditor to fix the stockholders' liability under the authority of foregoing section of the National Banking Act was approved.

In the case of *Hightower v. American Nat. Bank of Macon*, 263 U. S. 351, 68 L. Ed. 334, affirming (C. C. A., Ga., 1921), 276 F. 371, the facts were quite analogous to the instant case. In that case an agreement under which one national bank took over the assets of another for the purpose of liquidation and assumed the latter's liabilities was held to constitute a loan with the assets pledged as security, and not a purchase of the assets by the bank receiving them, and consequently, it was a creditor, entitled to enforce the liability of the shareholders of the liquidating bank, under Sections 5151, 5220 and 5221 of said National Banking Act. It was also held in that case that the claim of the second bank for money advanced in excess of the assets was not created during the liquidation but was a debt arising under the contract.

In *George v. Wallace*, 135 Fed. 286 (C. C. A. 8th), it was held that where a national bank assumes the debts of an insolvent bank contemplating liquidation, in consideration of a transfer of certain of the bank's available assets, and certain notes for the balance, such notes represented the "contracts, debts, and engagements" of the insolvent bank in equity, for which its shareholders were liable.

In *Schall v. Camors*, 251 U. S. 239, 64 L. Ed. 247, it was said (at p. 249, L. Ed. 252):

> "That clause b provides the procedure for liquidating claims provable under clause a if not already liquidated, especially those founded upon an open account or a contract express or implied, is entirely clear, and has been recognized repeatedly in our decisions" • • • and (at p. 251, L. Ed. 253).
>
> "Since claims founded upon an open account or upon a contract express or implied often require to be liquidated, some provision for procedure evidently was called for; clause b fulfills this function," &c.

As to the method of fixing the shareholder's liability it was said in *U. S. v. Knox*, 102 U. S. 422, 425; 26 L. Ed. 216:

> "In the process to be pursued to fix the amount of the separate liability of each of the shareholders, it is necessary to ascertain (1) the whole amount of the par value of all the stock held by all the shareholders; (2) the amount of the deficit to be paid after exhausting all the assets of the bank; (3) then to apply the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank, at its par value. There is a limitation of this liability. It cannot in the aggregate exceed the entire amount of the par value of all the stock."

6.

In considering the time when the stockholder's liability becomes fixed or due and owing a distinction must be made between national banks in liquidation and those for which a receiver has been appointed.

In the opinion of the District Court (R. 56) adopted by the Circuit Court of Appeals as its opinion (R. 83), it is said that "the statute found in 12 U. S. C. A. 65, providing for the fixing of the liability by the Court, as to banks in liquidation, could not advance the time of the defendants' liability, unless court proceedings had been taken thereunder." The cases of *Scovill v. Thayer*, 105 U. S. 143, and *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184, were cited as support for that view. In this respect, it is respectfully submitted that the lower Court fell into error. In the first place, 12 U. S. C. A. 65, (Act of Cong., June 30, 1876, c. 156, §2, 19 Stat. 63) does not provide for the "fixing" of the liability. That section provides that the individual liability of the shareholders "may be enforced" by any creditor. There is a decided difference between "fixing" and "enforcing" said liability. Secondly, a distinction was recognized by this Court in the case of *McDonald v. Thompson*, 184 U. S. 71, 46 L. Ed. 437, between actions brought by creditors under Section 5220 of the National Banking Act (providing for voluntary liquidation) and those brought by a receiver under Section 5234 (authorizing the Comptroller to step in, in the event of insolvency) to recover stockholder's assessment and in this connection Mr. Justice Brown, speaking for the Court, said (at p. 76, L. Ed. 440):

> "But it is also sufficient to say of this that the action is not brought by the creditors under the second section of the Act of June 30, 1876, but by the receiver under Rev. Sta. Sec. 5234. In such cases no debt becomes

due to the receiver as such until a deficiency has been ascertained and an assessment made, when the statute begins to run. Scovill v. Thayer, 105 U. S. 145; Hawkins v. Glenn, 131 U. S. 319."

Point C.

When a trustee disclaims title to burdensome property vested in him by operation of law, he cannot re-confer title in the bankrupt together with its attendant burdens or obligations without some affirmative action on the latter's part.

By the adjudication in bankruptcy and the appointment of the trustee, the bankrupt in this case was divested of all title to his property, and that title vested in the trustee as of the date of filing the petition in bankruptcy. Certainly there can be no doubt that such is the law.

It is likewise the law that the trustee may abandon any of the property of the bankrupt that he deems burdensome and worthless for the purposes of the bankrupt estate. It was argued below that the title to such abandoned property remains in or reverts to the bankrupt upon the exercise of the trustee's right of abandonment, and from this it is asserted in effect, that the obligations which attached to the abandoned property likewise remain in or revert to the bankrupt and are not discharged in the bankruptcy proceedings.

It is true that the courts have on many occasions said that the title to abandoned property revests in the bankrupt. However, there is no justification for the assertion that an abandonment of the property amounts to a reinstatement of the obligations affixed thereto.

As to encumbered property abandoned by the trustee, the Court *In re Webb*, 54 Federal (2d) 1065, 1067 (C. C. A. 4th), said that "The property and the right of redemption remains in or reverts to the bankrupt." There is, however, no law that has come to our attention by which it can be said that the bankrupt by reason of the abandonment is compelled to assert his right or title thereto. While there seems to be no direct statement of law on that specific question, there is nevertheless, an answer to be found by inference in statements made in several of the cases. In *First National Bank of Jacksboro v. Lasater*, 196 U. S. 115, 49 L. Ed. 408, in which the Court, speaking of trustees in bankruptcy, said (at p. 119, L. Ed. 409), "If they decline to take the property, the bankrupt *can assert* title thereto." This statement of this Court seems to indicate that it is for the bankrupt to elect to assert or claim the title to the abandoned property.

In re Wattley, 62 Fed. (2d) 828, 829 (C. C. A. 2d), the Court said:

> "When property is abandoned, the bankrupt *may reassert* whatever title he had before bankruptcy."

In the case of *In re Webb*, 54 Fed. (2d) 1065, 1067 (C. C. A. 4th), the Court, in speaking of the title to abandoned property said, "The bankrupt *has a right to assert* his title thereto."

In all of the above cited authorities, it is certainly apparent that the Court regarded as necessary some overt act on the part of the bankrupt before he could be said to have accepted the return of the title of the property so abandoned. No Court has yet said that after having been adjudicated a bankrupt and the bankrupt having been discharged from the burden of the obligations attached to his property, that same burdensome and onerous property

which in all probability compelled his bankruptcy, can be thrown back upon him with all its burdens by the mere act of abandonment by the trustee.

The trustee is the representative of the creditors. In fact, he is chosen by them. His status and duties are fully outlined in the case of *Imperial Assurance Company v. Livingstone,* 49 Fed. (2d) 745 (C. C. A. 8th). His abandonment and rejection of burdensome and onerous property is the abandonment and rejection of the creditors which he represents. If the creditors disapprove of the abandonment, they have the right to register objection by appropriate court action. If they do not register their objection, they thereby approve, in effect, what the trustee has done. Certainly the creditors, acting through the trustee, cannot by rejection and abandonment of property throw back the title thereto to an unwilling bankrupt, together with all its attendant obligation from which the bankrupt sought discharge. If such is the law, then the real purpose of the Bankruptcy Act cannot be accomplished. Then, too, if such could be done it would enable the creditor to withdraw or exclude his claim from the effect of a discharge. Certainly it cannot be said that personal property which is subject to the lien of a chattel mortgage can be abandoned by the trustee because it is burdensome and onerous and thus cast back upon the shoulders of the bankrupt the obligation to pay the chattel mortgage debt. Neither can the trustee abandon a real property asset subject to mortgage and so throw back upon the bankrupt the title thereto, together with all the mortgage obligation, unless the bankrupt should choose to accept it. Property which is the subject of judgment lien might be abandoned by the trustee, but certainly by so doing it cannot be said that the title reverts to the bankrupt and with it the obligation to pay the judgment.

If such is the law, the policy of the Bankruptcy Act to discharge the bankrupt from his debts and liabilities and enable him to take a fresh start would, in most cases, never be accomplished. It is respectfully submitted that ownership as distinguished from title to property can only be said to exist where the owner exercises some rights pertaining thereto.

There is no proof in this case which warrants the conclusion that petitioner was the legal owner of the stock in question at the time the assessment was made. On the application to strike the answer, the plaintiff, respondent herein, submitted an affidavit which appears on page 25 of the Transcript of Record. There is no proof in that affidavit that the defendant was the owner of the stock in question. There is merely a statement of the particulars of the suit upon which the plaintiff hoped to succeed. If, however, the statement in that affidavit can be taken to be a proof of title or ownership, the affidavit which was filed on behalf of the defendant, petitioner herein (R. 33), presents facts which refute the allegations of ownership as a matter of law.

VI.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its judicial discretion and of its supervisory powers, in order that the errors herein pointed out may be corrected; that the law may be properly and authoritatively defined, and that the judgment of the District Court and of the United States Circuit Court of Appeals for the Third Circuit should be reversed in order that justice may be done to petitioner;

and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Third Circuit and finally reverse it.

WM. ELMER BROWN, JR.,
Counsel pro se.